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Utah Supreme Court

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Robert Felton; Attornes forDefendant-RespondentJoseph L. Henriod; Attorneys for Plaintiff-Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARILYN MANDARINO OWEN,)
Plaintiff and Appellant,) Case No. 15330
-vs-)
ROBERT BALLARD OWEN,)
Defendant and Respondent.)
_____)

BRIEF OF DEFENDANT-RESPONDENT

Appeal from the Third Judicial District Court of Salt
Lake County, Honorable Stewart M. Hanson, Sr., Judge

Robert Felton
Attorney for Defendant-
Respondant
Twelve Exchange Place
Salt Lake City, Utah 84111

Joseph L. Henriod
Bruce J. Nelson
NIELSEN, HENRIOD, GOTTFREDSON
& PECK
Attorneys for Plaintiff- Appellant
410 Newhouse Building
Salt Lake City, Utah 84111

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Clerk, Supreme Court, Utah

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& PECK
Attorneys for Plaintiff- Appellant
410 Newhouse Building
Salt Lake City, Utah 84111

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DEFENDANT-RESPONDENT'S BEIEF

NATURE OF THE CASE

Appeal by the Plaintiff-Appellant from the decision of Stewart M. Hanson, Sr., Judge of the Third Judicial District Court of Salt Lake County, State of Utah, denying the Plaintiff-Appellant's Order to Show Cause to modify the 1973 Decree of Divorce to increase child support payments.

DISPOSITION OF CASE BY LOWER COURT

The lower court entered its Order that there is no substantial change in circumstances, since the Decree of Divorce, established by Plaintiff-Appellant justifying a modification of the Divorce Decree as to child support.

RELIEF ON APPEAL

Respondent requests this court affirm the judgment of the lower court and that Appellant's request for attorney's fees on appeal be denied.

STATEMENT OF FACTS

Parties to this action were divorced in the Third District Court of Salt Lake County, State of Utah on November 21, 1973, pursuant to the terms of a stipulation executed between the parties on the 15th day of November, 1973, (R. p.20). The Decree of Divorce (R. p.25) provided that Respondent was to pay the sum of One hundred dollars (\$100.00) per month per child, child support, for the use and benefit of the two minor children of the parties (R. p.26). Further, the Respondent was ordered to maintain health, life and accident insurance policies on the children until they were eighteen (18) years of age (R. p.27). The Respondent has fully complied with all the terms of the Divorce Decree (Appellants Brief p.2).

Respondent disagrees with Appellant's Brief (Appellants Brief p.3) that certain facts are established by the testimony given at the hearing. Respondent submits to the court that the following facts are established by the testimony and pleadings on file in this action:

1. Appellant claimed her monthly expenses have increased by \$432.33 per month (Tr. p.10). There was no evidence presented by the Appellant demonstrating which portion of her alleged increase in living costs for normal monthly expenses were attributable to the care, maintenance and support of the minor children, excluding child care which has decreased by \$90.00 (R. p.35).

2. Appellant's income has increased from \$4,200.00 per year (child support and alimony) in 1973; to \$7,800.00 per year in 1976 (Tr. pp. 23-24) to \$11,424.00 per year in 1977. This figure is arrived at by computing Appellant's income at the time the Order to Show Cause was filed, \$752.00 per month, multiplied by 12 months, plus \$2,400.00 per year child support. At the time the Order to Show Cause was filed the Appellant was netting \$600.00 per month plus \$200.00 per month per child or a net annual income of \$9,600.00 per year. The Plaintiff voluntarily terminated her merit position with the Utah State Auditor's office thirteen (13) days prior to the Order to Show Cause hearing (Tr. p.3, Tr. p.17), even though her net income had increased 229% since the time of the divorce.

3. Respondent's gross income increased from \$1,162.00 (\$13,944.00 per year) in 1973 to \$1,584.00 per month (\$19,008.00 annually) in 1977 (Tr. pp. 24, 26).

4. Respondant's net income increased from \$888.69 at the time of the divorce to \$1,121.10 at the time of the hearing (Tr. p. 26), a net increase of 26%.

5. Appellant's equity in the home awarded to her in the divorce is, at a minimum, \$25,000.00 after deducting the contingent claim of \$5,000.00 which Respondent has in the event Appellant remarries or sells the home (Tr. p.22).

6. At the time the Appellant suffered the injury referred to in her brief she was receiving alimony. At no

time did she request an increase of that award (Tr. p.22). Appellant represented in her affidavit filed in support of the Order to Show Cause that she lost time from work as a result of the injury. She later admitted this was false. She was not working at that time (Tr. p.20).

7. At the time of the divorce Appellant's Affidavit did not state or acknowledge that she was receiving any support or remuneration from her father whatsoever. The Appellant further testified that this undisclosed support terminated approximately two years before the hearing on this Order to Show Cause (Tr. p.7).

8. Appellant testified she had been unable to purchase clothes for her children, yet she purchased \$375.00 worth of clothes for herself in January of 1977 (Tr. p.18).

9. Appellant incurred a \$7,000.00 loan on January 17, 1977 (Tr. p.18) and signed the Affidavit in Support of the Order to Show Cause on the 26th day of February, 1977 (R. p.36).

10. The only item of furniture received by the Respondent at the time of the divorce was the kitchen table (Tr. p.23). Appellant received all other furnishings and fixtures.

11. The testimony regarding the purported medical and dental needs of the children were admitted over counsel for the Respondent's objection (Tr. p.13). The need and cost were complete hearsay and speculation.

12. After the divorce the Respondant could not afford

an apartment of his own (Tr. p.9) and had to live with his grandmother for a year to pay off the debts and obligations incurred prior to the divorce. In October of 1976, Respondent purchased a condominium as his principal residence (Tr. p.30). He borrowed the down payment from his mother (Tr. p.30), and currently has an additional obligation of \$6,500.00 to the Utah State Credit Union.

13. Since the time of the divorce Respondent has maintained medical insurance coverage for the children at all times (Tr. p.17).

14. Respondent's living expenses have gone up substantially more than those of the Appellant (R. p.52) including: medical insurance for Respondent and his children including current expenses directly related to the children as follows: medical insurance for Respondent and his children \$21.92 a month; savings bonds for the children, \$4.00 per month; child support, \$200.00 per month; children's clothing books etc. \$12.00 per month; Christmas and birthday gifts.

15. At the conclusion of the hearing, the court found no substantial change of circumstances proven by the Appellant to justify a modification of the Divorce Decree. Respondant requested no modification of the Decree.

ARGUMENT

POINT I

THERE HAS BEEN NO SUBSTANTIAL CHANGE IN THE APPELLANT'S

CIRCUMSTANCES TO JUSTIFY A MODIFICATION OF RESPONDANT'S
CHILD SUPPORT OBLIGATION.

At the time of the parties' divorce in November of 1973 the Appellant claimed monthly expenses in the sum of \$668.00 per month and income in the amount of \$56.00 per month (R. p.12). The Appellant executed a stipulation that a Decree be entered awarding her child support for two children in the sum of \$200.00 per month and \$150.00 alimony for a period of 18 months. This settlement was approximately \$300.00 less than her stated monthly expenses. At the time of the divorce, the home of the parties awarded to the Appellant was valued by her at \$27,000.00 (R. p.12) which is now worth at least \$53,000.00 (Tr. p.22). Appellant's equity is at least \$25,000.00.

Appellant's annual income for the year 1977, had she not quit her job 13 days prior to the hearing in the court below, would have been \$11,424.00 per year including the child support payable by the Respondant. Her net income for the year 1977, including child support would have been \$9,600.00 per year or \$800.00 per month net. This constitutes a net increase of 229% since the time of the divorce.

In November of 1973 the Respondent had a net income of \$888.69 which increased to \$1,121.10 (Tr. p.26); a net increase of 26% before deducting child support payments.

At the hearing before Judge Hanson, neither Appellant nor her counsel established, with any specificity, additional costs

necessary for the health and well being of the children. The only specific costs presented by the Appellant were in regards to speculative dental work. This testimony was admitted over objection of counsel for Respondent (Tr. p.13). Admission of this testimony constituted error in that it was speculative and hearsay. No work was performed nor arrangements made to perform it. It appears that Appellant doesn't know if, in fact, Respondent is unwilling to assume these costs. Appellant had not discussed the orthodontic work with him "for awhile" (Tr. p.20).

Appellant is attempting to modify the Decree because she finds working a substantial, merit position distasteful (Tr. p.17). Her alimony expired and she feels Respondent should support her. Respondent dearly loves his children and willingly supports them. He cannot and should not be subject to the Appellant's irresponsibility, regarding her finances, to pay her additional sums which she artfully claims the children need but are actually for her personal use.

Appellant's brief states that she could not afford insurance (App. brief p.7) but the transcript reflects only that she did not have insurance at the time of the accident. Appellant testified that the burn received by her interfered with her employment (Tr. p.9) but it is abundantly clear that her voluntary termination of her merit position with the State of Utah, five (5) days after the signing of the Affidavit in Support of Order to Show Cause, had nothing whatsoever to do with any

prior injury, but was a voluntary decision on her part (Tr. p.17). There is no dispute that the Respondent has the duty and obligation to provide support for the use and benefit of his minor children. He has faithfully complied with this Order since the Decree. There is also no question that the duty of support is not the Respondent's alone, 78-45-4 Utah Code Annotated (1953 is amended 1957).

Appellant cites several cases in support of the proposition that inflationary trends are grounds to modify the Decree of Divorce. The issue before the court below was not inflation, but whether or not Appellant presented sufficient evidence to the court to establish a substantial change in circumstances requiring additional support. The evidence is clear that the real substantial change in circumstances has been Appellant's greater income. Respondent makes no attempt in these proceedings to reduce the child support payable, recognizing he has an obligation towards his children to assist in their support and maintenance.

The trial court had the opportunity to observe the demeanor of the witnesses at the hearing and was in a superior position to judge the veracity and needs of the respective parties.

Appellant relies on the case of Russell v. Russell 551 p.2d 231 (Utah 1976) to support the proposition that inflation or increased age of children, in and of itself, is sufficient to justify increasing support. In the Russell case the husband

did not present any evidence as to his financial condition. Respondent submitted all available information regarding his financial status and, while it is conceded that his net income has increased 26% since the time of divorce, his basic monthly expenses have also increased. In the Russell case, the decision of the Court held that since the ex-husband chose not to present any testimony regarding his current financial status it should be presumed that he is capable of paying \$160.00 a month for his two minor children whereas, at the time of the divorce, he was found able to pay \$338.40 support for six children.

Appellant also contends that the case of Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974), holds that inflation and the fact the children are older are sufficient grounds to justify an increase in support. Appellant badly misconstrues the Mitchell case. The Court found that the wife and the children were in need of additional sums to support themselves. Because the transcript was not submitted and this Court could not review the record, the district court decision was presumed valid and:

The burden is upon Appellant to prove that the evidence clearly preponderates against the finding as made; or there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or a serious inequity has resulted as to manifest a clear abuse of discretion. [Citing Harding v. Harding, 26 U. 2d 277, 48 P. 2d 308 (1971); Searle v. Searle, 522 P. 2d 697 (Ut. 1974)], (P. 1360).

The decision of Judge Hanson is clearly supported by the record. The evidence preponderates to support Judge Hanson's findings and the order entered by Judge Hanson, without objection by the Appellant (R. p. 60), is in conformance with

the aforementioned decision of this Court.

POINT II

THE ACTIONS OF THE APPELLANT SHOULD BAR HER FROM OBTAINING EQUITABLE RELIEF.

This action is an attempt to obtain alimony under the guise of child support. It is submitted that a review of the evidence and pleadings in this action requires the application of the principal that "one who seeks equity must do it". Sovey v. Sovey 29 U. 2d 294, 508 P. 2d 810 (1973). At the time of the divorce, the Appellant submitted in her Affidavit (R. p.12) that her monthly minimum expenses were \$668.00. She stated that she had no other source of income. The Appellant then stipulated to the entry of the decree whereby the Respondent was to pay her \$350.00 per month. At the time of the Order to Show Cause hearing in June of 1977, the Appellant suddenly materializes a previously undiscolsed source of income, her father. She testified he helped her financially (Tr. p.16) in an average amount of \$250.00 per month up and until July, 1975, two years before the Order to Show Cause hearing. The Appellant filed a false affidavit at the time of the divorce and falsly testified at the hearing. She stated that during the year 1973 and 1974 she had no income (Tr. p.23). Further, she stated that during the year 1975 she made \$1,700.00 from the real estate contract (Tr. p. 23 & 24). She made no mention of the sums attributed to her father, as income to her.

In October of 1976 the Respondent, after several years of careful, financial management, including living with his grandmother for a year to catch up on the bills from his divorce (Tr. p.29), purchased a condominium. The indebtedness assumed by the Respondent at the time of the divorce was between \$3,000.00 and \$4,000.00 (Tr. p.29). In October, 1976 the Respondent did not have sufficient capital to make a down payment on this residence. He borrowed \$2,600.00 from his mother (Tr. p.30) and has reduced that obligation to \$2,100.00. He has owned this condominium for less than one year. He also owes the Utah State Credit Union \$6,500.00.

The Appellant, apparently did not believe the Respondent should be able to improve his living conditions. Immediately after Respondent purchased the condominium in October of 1976 the Appellant took steps to set up artificial grounds to substantiate her claim to modify the decree. On January 17, 1977 Appellant instituted a loan of Seven thousand dollars (\$7,000.00) (Tr. p.18). Four thousand dollars (\$4,000.00) was expended to pay for her medical bills because she failed to carry medical insurance. (Tr. p.18). Another portion of the money was spent to pay off obligations which the Respondent had co-signed in an attempt to assist his ex-wife. Appellant also purchased \$350.00 to \$400.00 worth of new clothes for herself (Tr. p.18), and paid some house payments and heating bills. Three weeks after the Appellant obtained the loan, she signed the affidavit in support of her Order to Show Cause (R. p.34). On the second

day of June, 1977, 13 days prior to the Order to Show Cause, Appellant quit her job (Tr. p.17) where she had worked for more than a year as a merit employee for the State of Utah. She then testified that her gross salary potential was \$600.00 per month (Tr. p.5) two weeks after she has quit a job in which she grossed \$752.00 per month.

POINT III

THE APPELLANT FAILED TO PRESENT EVIDENCE SUFFICIENT FOR THE COURT TO MAKE ANY DETERMINATION AS TO THE PURPORTED INCREASED NEEDS OF THE CHILDREN.

The Appellant chose to present evidence as to her general cost of living (Tr. p. 11 and 16). The evidence was insufficient to substantiate any claim that the children are in need of increased support from the Respondent. Aside from the hypothetical medical and dental expenses the Appellant failed to attribute any of her purported expenses to the children with any specificity. Respondent does not contend that child support payments must be computed from specifically, proportioned needs of the children as compared to the family unit as a whole. Appellant must establish by competent testimony that there is, 1.) a real and actual need by the children for additional support and 2.) the nature and extent of that need. The Appellant failed to establish either condition.

The fact that the Appellant claims her car is run down (Tr. p.14); she doesn't bother to do her yard work (Tr. p.14); there are four windows which do not have drapes and did not have

at the time of the divorce (Tr. p.14); gasoline costs have increased (Tr. p.11) and she requires more expensive clothing (Tr. p.11) are not relevant to the issues before Court. The purported medical and dental needs of the children, admitted over counsels' objection, are single expenditures. It is interesting to know that Appellant did not request the court order that the Respondent assist her in these expenses. Rather, Appellant attempted to utilize this evidence to support an increase in Respondent's continuing support duty rather than have the Respondent aid her in these extraordinary expenses if and when they are ever incurred. There was never any evidence submitted to the increased costs to support the children themselves. Without more specific costs of the increased needs of the children any decision which the court would have made would have been purely speculative and a clear abuse of discretion. The court was unable to determine that the children, and not the Appellant, needed additional funds.

POINT IV

RESPONDENT SHOULD NOT BE COMPELLED TO PAY THE APPELLANT'S ATTORNEY'S FEES ON APPEAL.

Appellant has set forth in her brief (Appellant's brief page 12) that the Respondent: " ***has refused to adequately assist in supporting such children". This allegation is absolutely false. The Respondent has timely and fully complied with the Divorce Decree. He dearly loves his children and willingly

contributes to their support and maintenance. It is unjust that the Respondent be ordered to support the Appellant's calculated and artificial attempt to obtain alimony under the guise of child support. The Appellant was denied attorney's fees in the court below and should be denied such fees on appeal.

CONCLUSION

Respondent requests the decision of the lower court be affirmed. The substantial change in circumstances was not established by the Appellant. Appellant's income has risen substantially more than that of the Respondent. She has manipulated her income and needs to present a destitute picture. Upon examination, this picture reveals a woman with excellent employment but with grandiose expectations. The Appellant quits her job and requests additional child support. The issue is not child support. The Appellant has failed to demonstrate any increased needs of the children with reasonable certainty. She simply decided that she did not like working and looked to the Respondent to pick up the slack. The Respondent has worked for the last several years to re-establish his own security. He has done this in conjunction with his obligation to assist his children not in spite of that responsibility.

The only substantial change of circumstances that has occurred since the divorce is that the Appellant's net income

has increased 229% since the time of the divorce. Respondent's income has increased 26% since the time of the divorce but that increase has been totally absorbed by his increased housing needs. Respondent should not have to bow to the whims and caprices of the Appellant which she establishes for her own benefit, not those of the children.

Respectfully submitted,

Robert Felton
Robert Felton
Attorney for Defendant
Twelve Exchange Place
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

SERVED the foregoing Brief of Respondent by delivering two copies thereof, personally, to Joseph L. Henriod or Bruce J. Nelson, Attorney for Appellant at 410 Newhouse Building, Salt Lake City, Utah 84111, this 15th day of ^{DEC}~~November~~, 1977.

Kathy Vonder Haar